A **PENGARAH HOSPITAL SELAYANG & ORS**

v.

AHMAD AZIZI ABDULLAH JAMES & ORS

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
MOHAMED APANDI ALI JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: W-01(IM)-388-2011]
C 9 FEBRUARY 2012

CIVIL PROCEDURE: *Parties - Government, action against - Government should not be primary defendant - Whether tortfeasors correctly named - Whether vicarious liability established - Government* D *Proceedings Act 1956, ss. 5 & 6*

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Application for - Whether delay of more than two years excessive - Whether limitation set in - Rules of the High Court 1980, O. 18 r. 19*

E ***TORT:*** *Negligence - Medical negligence - Duty of care - Whether negligence confined to wrongful treatment - Whether negligent system of medical care and attention - Whether director of hospital owed duty of care on behalf of hospital - Whether breach of duty by surgeon, doctor or nurse working in hospital vicariously imputed to director of hospital -* F *Whether director of hospital correct party to be cited*

Sutini Yadi ('the deceased'), who was eight months pregnant, had a severe vaginal bleeding and was rushed to the emergency department of the Selayang Hospital ('the hospital'), where she G was referred to the maternity ward. Shortly thereafter, her husband ('the first plaintiff') was informed that the deceased had passed away and the cause of death was listed as "primary postpartum haemorrhage with dissemination intravascular coagulation". The plaintiffs brought an action against the H defendants. The writ of summons and statement of claim named the Director of the Selayang Hospital and the Government of Malaysia as the first and third defendants respectively. However, more than two years after the filing of their defence, the defendants filed their application to strike out the plaintiffs' writ of I summons and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980, on the grounds that: (i) the plaintiffs failed to disclose a reasonable cause of action against the

defendants by the reason of the failure on the part of the plaintiffs to allude to the particulars of negligence against the tortfeasors who were not named as the defendants in the writ of summons and the statement of claim; (ii) the plaintiffs' claims were scandalous, frivolous or vexatious and failed to comply with the provisions of ss. 5 and 6 of the Government Proceedings Act 1956 ('the Act'); and (iii) the plaintiffs' claims was an abuse of the process of the court. The High Court dismissed the defendants' application and hence this appeal.

Held (dismissing defendants' appeal with costs here and below)

Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Although a party wishing to strike out the pleadings could do so "at any stage of the proceedings", it does not give the party the right to adopt a lackadaisical attitude and sleep on their rights. The defendants' application was filed too late in the day when the limitation had set in and the plaintiffs could not amend their statement of claim. In the circumstances, the delay must be construed adversely against the defendants. (paras 8 & 15)

(2) The averments in the statement of defence of the first and third defendants showed that the first defendant was in charge of all the surgeons, doctors, and nurses in the hospital. These hospital personnel were the agents of the first defendant who attended to the deceased at the material time. Nowhere did the defence aver that the first defendant was not the correct party. (paras 14 & 15)

(3) Pursuant to ss. 5 and 6 of the Act, the tortfeasors must be named and the Government should not be the primary defendant in the suit. The Director of the hospital owed the deceased a duty of care, subject to proof, on behalf of the hospital for negligent acts of all its surgeons, doctors and nurses working in that hospital individually and collectively. The duty of care was vicarious in the sense that any breach of the duty of care by any surgeon, doctor or nurse working in the hospital was vicariously imputed to the Director of the hospital. Hence, the naming of the first defendant was not scandalous, frivolous or vexatious and neither was it an abuse of the process of the court. (para 17)

(4) The plaintiffs' complaint was not confined to negligence arising out of wrongful treatment, but also for the "negligent system of medical care and attention" provided by the emergency section of the hospital. That being the case, the first defendant was the correct party to be cited as the first defendant and this was certainly not a plain and obvious case for striking out (*Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor;* refd, *Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case;* refd). (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Sutini Yadi ('si mati'), yang mengandung lapan bulan, mengalami pendarahan vagina yang teruk dan dikejarkan ke bahagian kecemasan Hospital Selayang ('hospital'), di mana beliau dirujuk ke wad bersalin. Tidak lama selepas itu, suaminya ('plaintif pertama') dimaklumkan bahawa si mati telah meninggal dunia dan sebab kematian dinyatakan sebagai "primary postpartum haemorrhage with dissemination intravascular coagulation". Plaintif-plaintif memulakan tindakan terhadap defendan-defendan. Writ saman dan penyata tuntutan menamakan Pengarah Hospital Selayang dan Kerajaan Malaysia masing-masing sebagai defendan pertama dan ketiga. Walau bagaimanapun, lebih dari dua tahun selepas memfailkan pembelaan mereka, defendan-defendan memfailkan permohonan membatalkan writ saman dan penyata tuntutan plaintif-plaintif di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980, atas alasan bahawa: (i) plaintif-plaintif gagal mendedahkan kausa tindakan yang munasabah terhadap defendan-defendan atas kegagalan pihak plaintif membekalkan butiran kecuaian terhadap pelaku tort yang tidak dinamakan sebagai defendan-defendan dalam writ saman dan penyata tuntutan; (ii) tuntutan plaintif-plaintif adalah remeh, mengaibkan dan menyusahkan dan gagal mematuhi peruntukan ss. 5 dan 6 Akta Prosiding Kerajaan 1956 ('Akta tersebut'); dan (iii) tuntutan plaintif-plaintif merupakan suatu penyalahgunaan proses mahkamah. Mahkamah Tinggi telah menolak permohonan pihak defendan dan oleh itu, rayuan ini.

Diputuskan (menolak rayuan defendan-defendan dengan kos di mahkamah ini dan mahkamah bawahan)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Walaupun sesuatu pihak yang ingin membatalkan pliding boleh berbuat demikian "pada mana-mana peringkat prosiding", ia

tidak memberikan pihak tersebut hak untuk mengambil sikap acuh tak acuh dan tidak mengendahkan haknya. Permohonan defendan-defendan difailkan terlalu lewat apabila had masa telah tamat dan plaintif-plaintif tidak boleh membuat pindaan kepada penyata tuntutan mereka. Dalam hal demikian, kelewatan tersebut mesti ditafsir bertentangan terhadap defendan-defendan.

(2) Pernyataan-pernyataan di dalam penyata pembelaan defendan pertama dan ketiga menunjukkan bahawa defendan pertama bertanggungjawab terhadap kesemua pakar bedah, doktor dan jururawat di hospital tersebut. Kakitangan hospital ini adalah ejen kepada defendan pertama yang memberikan rawatan kepada si mati pada masa material. Pihak pembelaan tidak menyatakan di mana-mana bahawa defendan pertama bukan pihak yang dinamakan dengan betul.

(3) Berikutan ss. 5 dan 6 Akta tersebut, pelaku tort mesti dinamakan dan Kerajaan tidak boleh menjadi defendan utama dalam guaman tersebut. Pengarah hospital tersebut mempunyai kewajipan berhati-hati terhadap si mati, tertakluk kepada bukti, bagi pihak hospital terhadap tindakan cuai kesemua pakar bedah, doktor dan jururawat yang bekerja di hospital tersebut secara individu dan secara kolektif. Kewajipan berhati-hati tersebut adalah vikarius di mana apa-apa pelanggaran kewajipan berhati-hati oleh mana-mana pakar bedah, doktor atau jururawat yang bekerja di hospital tersebut berlaku, ia akan dipertanggungjawabkan kepada pengarah hospital tersebut. Dengan itu, menamakan defendan pertama adalah tidak remeh, mengaibkan dan menyusahkan dan ia juga bukan suatu penyalahgunaan proses mahkamah.

(4) Aduan plaintif-plaintif juga tidak terhad kepada kecuaian yang timbul daripada kesalahan merawat, tetapi juga "negligent system of medical care and attention" yang diberikan oleh bahagian kecemasan hospital tersebut. Oleh sebab itu, defendan pertama adalah pihak yang dinamakan dengan betul sebagai defendan pertama dan ia nyata bukan kes yang jelas untuk dibatalkan. (*Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor;* dirujuk, *Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case*; dirujuk).

Case(s) referred to:

Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor [2007] 5 CLJ 38 CA ***(refd)***

Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Lau Chee Ching v. Niah Native Logging Sdn Bhd [2002] 3 CLJ 538 CA ***(refd)***

Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***

Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2003] 8 CLJ 265 HC ***(refd)***

Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case [1998] 1 CLJ 254 HC ***(refd)***

MJC City Development Sdn Bhd v. Everrise Departmental Store Sdn Bhd [1998] 1 LNS 101 HC ***(refd)***

Oh, Thevesa v. Sia Hok Chai [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC ***(refd)***

Pacific Internet Ltd v. Catcha.com Pte Ltd [2000] 3 SLR 26 ***(refd)***

Rosli Mohd Amin & Yang Lain lwn. Pengarah Hospital Segamat & Yang Lain [2011] 5 CLJ 97 HC ***(foll)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 5, 6

Rules of the High Court 1980, O. 18 r. 19

For the defendants/appellants - Nik Mohd Noor Nik Kar; SFC

For the plaintiffs/respondents - Mohan Ramakrishnan; M/s Ramakrishnan & Assocs

Reported by S Barathi

JUDGMENT

Abdul Malik Ishak JCA:

[1] This is an *ex tempore* judgment of this court.

[2] We will refer the parties as the plaintiffs and the defendants like what they were referred to by the High Court.

[3] At the outset, the plaintiffs withdrew their claim against the second defendant (Kementerian Kesihatan Malaysia) and the High Court Judge forthwith struck out the plaintiffs' claim against the second defendant.

[4] The defendants filed an application to strike out the plaintiffs' writ of summons and the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') and under the inherent jurisdiction of the court. In due course, the High Court dismissed the defendants' application and they now appeal to this court.

[5] It is trite law that only in plain and obvious cases that recourse should be had to the summary process of striking out pleadings under O. 18 r. 19 of the RHC (per Abdul Hamid Omar CJ (Malaya) (later the Lord President of the Supreme Court) in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293, [1985] 2 MLJ 385, at p. 386, SC).

[6] The power to strike out is a drastic power and should be exercised with utmost caution (per Lee Hun Hoe CJ (Borneo) in *Lee Nyan Choi v. Voon Noon* [1978] 1 LNS 94; [1979] 2 MLJ 28, at p. 29, FC).

[7] Striking out will not be entertained in the following situations (the categories are not closed and it will expand according to the factual matrix of each case):

(a) where the action contains a point of law which requires a serious argument, it is not appropriate to strike it out (*Oh, Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148; [1992] 1 MLJ 215);

(b) where it involves a complex case (*Pacific Internet Ltd v. Catcha.com Pte Ltd* [2000] 3 SLR 26);

(c) where the deed of settlement is challenged for being illegal, void and unenforceable and contrary to the Contracts Act 1950 (*Lau Chee Ching v. Niah Native Logging Sdn Bhd* [2002] 3 CLJ 538; [2002] 4 MLJ 8, CA); and

(d) where it involves a minute examination of the documents tendered and a thorough examination of the relevant terms in the agreements between the parties (*MJC City Development Sdn Bhd v. Everrise Departmental Store Sdn Bhd* [1998] 1 LNS 101; [1999] 5 MLJ 42).

[8] The facts of the present appeal concerned the death of Sutini Yadi after she received treatment in a government hospital. The plaintiffs being the family members of the deceased brought an action against the defendants. The writ of summons and the statement of claim dated 17 August 2007 named the Director of the Hospital Selayang and the Government of Malaysia as the first and third defendants respectively. The unconditional appearance and later the defence dated 27 June 2008 were filed by the Attorney General's Chambers on behalf of the first and third defendants respectively. After pleadings were closed, the matter was then set for case management. The bundles of documents on both sides were filed. The plaintiffs' witness statements were also filed. Two years seven months and 25 days after filing their defence, the defendants filed their application to strike out the plaintiffs' writ of summons and the statement of claim. The delay must be construed adversely against the defendants. Although a party wishing to strike out the pleadings could do so "at any stage of the proceedings", this does not give the party the right to adopt a lackadaisical attitude and sleep on their rights (*Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* [2003] 8 CLJ 265; [2003] 1 AMR 206). Moreover, it is always prudent to act promptly – at least before the close of the pleadings (*Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773; [1992] 2 MLJ 46).

[9] The defendants' striking out application hinged on three main grounds, namely:

(a) that the plaintiffs failed to disclose a reasonable cause of action against the defendants by reason of the failure on the part of the plaintiffs to allude to the particulars of negligence against the tortfeasors who were not named as the defendants in the writ of summons and the statement of claim;

(b) that the plaintiffs' claims are scandalous, frivolous or vexatious and failed to comply with the provisions of ss. 5 and 6 of the Government Proceedings Act 1956 ('the Act'); and

(c) that the plaintiffs' claims constitute an abuse of the process of the court. A

[10] The defendants argue that in the statement of claim the plaintiffs named the Director of the Selayang Hospital as the first defendant and the Government of Malaysia as the third defendant. The defendants argue that the Director of the Selayang Hospital is not the person who treated the deceased Sutini Yadi and for that reason the plaintiffs had failed to comply with ss. 5 and 6 of the Act. B

[11] The plaintiffs submit that they had the right to file a claim against whomsoever they alleged they had a claim for negligence and whether they succeed would be up to the court to determine and decide. On 21 October 2006 at about 4.30am, the deceased Sutini Yadi was 37 years of age and was eight months pregnant and had severe vaginal bleeding and she was rushed to the emergency department of the Selayang Hospital. There she was referred to the maternity ward. At 7.45pm of the same day, her husband – the first plaintiff, was informed that the deceased Sutini Yadi had passed away. The cause of death was listed as "primary postpartum haemorrhage with dissemination intravascular coagulation". The defendants deny that the death of Sutini Yadi was caused by their negligence. C D E

[12] The first defendant – the Director of the Selayang Hospital, takes charge of and is responsible for all the medical personnel there. All the surgeons, doctors and nurses are under the charge of the first defendant. F

[13] Paragraph 9 of the statement of defence of the first defendant and the third defendant reads as follows (see pp. 40 to 41 of the appeal record): G

> 9. Lanjutan dari Perenggan 7 Pembelaan, Defendan Pertama dan ketiga menegaskan bahawa segala rawatan ke atas si mati oleh Defendan Pertama dan Ketiga dan/atau pengkhidmat dan/atau agennya telah dilaksanakan mengikut amalan kemahiran serta penjagaan yang munasabah serta mengikut amalan perubatan yang diterima pakai di hospital itu pada masa berkenaan. Seterusnya, Defendan Pertama dan Ketiga menyatakan bahawa: H
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> (a) bahawa si mati telah diletak di bawah pengawasan, pemerhatian serta penjagaan yang berterusan dari waktu si mati dimasukkan ke wad; I

A (b) bahawa segala tindakan yang perlu telah diambil untuk si mati melahirkan dengan keadaan yang selamat;

(c) keadaan 'atonic uterus' akibat dari Placenta *Praevia* Type 4 dan juga komplikasi DIVC yang dialami telah merumitkan pembedahan yang dijalankan ke atas si mati;

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(d) tidak terdapat kelengahan dan kelewatan dalam memberi rawatan dan jagaan dari segi perubatan kepada si mati pada setiap masa yang material.

C **[14]** And the averments in para. 9 of the statement of defence of the first defendant and the third defendant show that the first defendant is in charge of all the surgeons, doctors and nurses in the Selayang Hospital. And these hospital personnel are the agents of the first defendant who attended to the deceased Sutini Yadi at the material time.

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[15] Nowhere did the defence aver that the first defendant – the Director of the Selayang Hospital, was not the correct party. And when the defendants filed the summons in chambers to strike out the writ of summons and the statement of claim, it was done E too late in the day. Now, limitation has set in and the plaintiffs cannot amend their statement of claim to cite the relevant doctors who were purportedly negligent in attending to the deceased Sutini Yadi.

F **[16]** The plaintiffs submit that they did not file an affidavit in reply in response to the defendants' application to strike out because the issue raised was one of law, not factual. And at that time, according to the plaintiffs, the plaintiffs did not know the duties of the first defendant – the Director of the Selayang G Hospital.

[17] According to ss. 5 and 6 of the Act, the tortfeasors must be named and that the Government should not be the primary defendant in the suit (*Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663; [2009] 1 MLJ 1, FC; and *Government H of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945; [2010] 5 MLJ 717, CA). But, according to the plaintiffs, the names of the doctors were not known at the time of the filing of the writ of summons and the statement of claim. Even the defendants in their statement of defence did not state the names of the doctors. I In our judgment, it is sufficient to cite the first defendant as the

national head of the Selayang Hospital. In *Rosli Mohd Amin & Yang Lain lwn. Pengarah Hospital Segamat & Yang Lain* [2011] 5 CLJ 97; [2011] MLJU 74, a medical negligence case, the parties agreed that the defendant, who was represented by the Attorney General's Chambers, was 100% liable for the injuries sustained by the plaintiffs there. Likewise here, naming the Director of the Selayang Hospital as the first defendant is not scandalous, frivolous or vexatious. Neither is it an abuse of the process of the court. In our judgment, the Director of the Selayang Hospital owes the deceased Sutini Yadi a duty of care, subject to proof, on behalf of the Selayang Hospital for the negligent acts of all its surgeons, doctors and nurses working in that hospital individually and collectively. And this duty of care, subject to proof, is vicarious in the sense that any breach of this duty of care by any surgeon, doctor or nurse working in the Selayang Hospital is vicariously imputed to the Director of that hospital.

[18] Paragraph 17 of the statement of claim recites *in extenso* the negligence and the breach of contract on the part of the defendants. The particulars of the negligence and the breach of contract of the defendants are itemised from paras. 17.1 to 17.20 of the statement of claim. The complaint of the plaintiffs is not confined to negligence arising out of wrongful treatment but also for the "negligent system of medical care and attention" provided by the emergency section of the Selayang Hospital. That being the case, the Director of the Selayang Hospital is the correct party to be cited as the first defendant (*Dominic Puthucheary & Ors v. Dr Goon Siew Fong & Anor* [2007] 5 CLJ 38; [2007] 5 MLJ 552, CA, at p. 556). This is certainly not a plain and obvious case for striking out (*Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case* [1998] 1 CLJ 254; [1997] MLJU 245). On the available evidence, the plaintiffs do have a reasonable cause of action against the defendants.

[19] For these brief reasons, we unanimously dismiss the appeals of the defendants with costs of RM10,000 here and below. We affirm the decision of the High Court. The case should proceed to trial within this year to its final conclusion.